Committee on Resources

Subcommittee on Energy & Mineral Resources

Statement

Oversight Hearing before the Subcommittee on Energy and Mineral Resources of the House Resources Committee

Effect of Federal Mining Fees and Proposed Federal Royalties on State and Local Revenues and the Mining Industry

October 23, 1999

Statement of Randall E. Hubbard

Davis, Graham & Stubbs LLP

370 17th Street, Suite 4700

Denver, Colorado 80202

- INTRODUCTION

I am an attorney with the law firm of Davis, Graham & Stubbs LLP in Denver, Colorado, practicing mining law. My practice involves the representation of mining companies and individuals seeking to explore for, develop and mine hard-rock, industrial and energy minerals throughout the Western United States, primarily on federal lands. In the past, I have served as the president of the Mineral Law Section of the Colorado Bar Association, a member of the board of trustees of the Rocky Mountain Mineral Law Foundation, and a vice chair of the Hard Rock Minerals Committee of the American Bar Association Section on Natural Resources, Energy and Environmental Law. I am currently the co-chair of the Mining Law Review Subcommittee of the Colorado Mining Association's Hard Rock Minerals Committee. I have authored or co-authored a number of papers dealing with mining law issues, including "Coping with Mining Law Reform," 37 Rocky Mtn. Min. L. Inst. 12-1 (1991); "Rental Fees, Assessment Work and Maintenance Requirements for Unpatented Mining Claims - Getting Simpler?," 40 Rocky Mtn. Min. L. Inst. 8-1 (1994); and "The New Form 5A LLC: Implementation of Form 5A in the LLC Context," 44 Rocky Mtn. Min. L. Inst. 13-1 (1998).

I have reviewed the Solicitor's Opinion issued by John Leshy entitled "Limitations on the Patenting of

Millsites under the Mining Law of 1872," dated November 7, 1997 ("Solicitor's Opinion"). In the Solicitor's Opinion, Mr. Leshy concluded that (a) the plain language of those provisions of the 1872 Mining Law (sometimes referred to hereinafter as the "Mining Law" or the "Mining Law of 1872") dealing with millsite patenting allow for only one five-acre millsite to be located and patented in association with each lode or placer mining claim, and (b) that the Bureau of Land Management ("BLM") may not approve any plans of operation that do not abide by that millsite-to-mining-claim acreage ratio (the "Mining Claim/Millsite Ratio").[(1)] I have also reviewed some of the testimony presented at Congressional hearings on this topic held (a) on June 15, 1999, by the Subcommittee on Forests and Public Land Management of the Senate Energy and Natural Resources Committee, (b) on August 3, 1999, by the Subcommittee on Energy and Mineral Resources of the House Resources Committee, and (c) on September 11, 1999, by the Subcommittee on Energy and Mineral Resources of the House Resources Committee.[(2)]

In preparing my written testimony, I have relied a great deal on the Alfers Statement, the Garver Statement, the McCrum Statement and the Jeppson Statement, each of which address many of the same issues addressed herein. I have borrowed freely from the analysis contained in those statements, often without attribution, and I owe a debt of gratitude to those authors. It is worth noting (although perhaps not surprising to note) that in the Garver Statement, Patrick Garver, who is cited in the Solicitor's Opinion as the author of an article that provides support for the existence of a Mining Claim/Millsite Ratio, concludes that "to the extent the (Solicitor's Opinion) is presented to the Subcommittee as a fair and complete characterization of either the law or historic agency practice regarding the use of 'multiple millsites,' it is wrong," and that, to the extent Mr. Garver's own work was cited in the Solicitor's Opinion, it is "misleading." Garver Statement, pp.2 and 5.

I would respectfully like to offer the Subcommittee the following comments on the Solicitor's Opinion, focusing on the issues of: (i) whether or not Secretary Leshy is correct in the conclusions he reached in the Solicitor's Opinion as set forth above, based on the analysis set forth in the Solicitor's Opinion; and (ii) whether it is correct to characterize the issues that have been raised by the Solicitor's Opinion (as exemplified by the March 25, 1999 decision of the Solicitor of the United States Department of the Interior stating that the BLM and the Forest Service were unable to approve the proposed plan of operations for the Crown Jewel Mine because it did not comply with the requirements of the Mining Law of 1872), as environmental issues.

- EXAMINATION OF THE LEGAL ANALYSIS SET FORTH IN THE SOLICITOR'S OPINION
    - The Solicitor's Opinion is not an Objective Legal Analysis

It is important for the Subcommittee to realize that the Solicitor's Opinion does not appear to have been designed as an objective legal analysis. Rather, and particularly when the sources and precedents cited by Solicitor Leshy as authority for the Solicitor's Opinion are examined in more detail, it looks much more like an attempt to support a particular policy position regarding the use of public lands for mineral development. This lack of objectivity can be demonstrated by way of a more-detailed examination of the different components of the legal analysis included in the Solicitor's Opinion to arrive at the conclusions contained therein, which indicates that most, if not all, of the statutory, judicial, and administrative sources cited in the Solicitor's Opinion do not pertain to or in fact contradict the existence of a Mining Claim/Millsite Ratio. As a result, to the extent that the Solicitor's Opinion is presented or understood as a comprehensive analysis of the law, or of agency practice regarding the Mining Claim/Millsite Ratio, it is important to correct that

mischaracterization. The Solicitor's Opinion refers for support to: (i) the plain language of the statute; (ii) legislative history; (iii) decisions of the Department of the Interior; (iv) the actions of the agencies that have been charged with administering the statute; and (v) treatises and legal scholarship. In each area, the analysis in the Solicitor's Opinion falls short of supporting the conclusions reached therein.

- The "Plain Language" of the Statute

In the Solicitor's Opinion, Solicitor Leshy suggests that the "plain language" of the Mining Law of 1872 "indicates" that only one five-acre millsite per mining claim may be patented.[(3)] By his own choice of language, Mr. Leshy, presumably unintentionally, draws attention to the weakness of his own argument as to the plain meaning of the statute. He suggests that the "plain language" of the statute" "indicates" rather than, for example, "makes clear," or "provides explicitly" that there is a Mining Claim/Millsite Ratio. In fact, it is difficult to find even an indication in the Mining Law that only one five-acre millsite per mining claim may be patented.

The Mining Law provides that a millsite may be patented as follows:

- Vein or lode and millsite owners eligible

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made on and after May 10, 1872 of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by Sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and Section 661 of Title 43 for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his millsite, as provided in this section.[(4)]

The Solicitor's Opinion correctly points out that 30 U.S.C. § 42(a) places limitations on individual millsite locations in that each such location must be: (i) non-mineral; (ii) not contiguous to the vein or lode; (iii) used or occupied by the proprietor of the vein or lode for mining or milling purposes; and (iv) not more than five acres.[(5)] The Solicitor's Opinion goes on, however, to suggest that the above-referenced language imposes an additional limitation, that only a single five-acre millsite may be claimed in connection with each mining claim, because of the reference to "such land" that may be included in a patent application, and the additional language that indicates that "no location" of "such" land shall exceed five acres. The Solicitor's Opinion suggests that the word "such" indicates that the same parcel of land that meets the other requirements for a millsite claim is the land that is being limited to a five-acre area.[(6)]

On its face, however, the referenced language does not contain any express statement or even any implication of a numeric limitation on the number of millsites that may be located (or patented). Rather, it limits the number of acres which any individual millsite may cover, by limiting each "location" to five acres. Location is a term of art under the Mining Law of 1872. Locating is the act of staking, posting monuments and delineating a mining claim or millsite on the ground. The mining claim or millsite is commonly referred to as a "location."[(7)] When the statute states that "no location made on and after May 10, 1872 of such non-

adjacent land shall exceed five acres," it means that there is a five-acre limitation on the size of each individual millsite claim, not a limitation on the number of millsites which may be located. It is important to bear this distinction in mind, because (as discussed below) many of the Interior Department decisions cited by the Solicitor in support of the Mining Claim/Millsite Ratio in fact address the question of the size of an individual millsite rather than any limitation on the number or acreage of multiple millsites.

The Solicitor's Opinion indicates that construing the statute to permit multiple millsites without regard to the aggregate size limit would vitiate the five-acre statutory limit on the size of a millsite location.(8) There are, however, other sections of the Mining Law of 1872 authorizing the location of lode and placer mining claims, and those provisions too place acreage limitations on the size of each individual location.(9) There is no limit in the law, however, regarding how many such locations may be established and patented. No one would suggest that because a lode mining claim is limited to "1500 feet in length along the vein or lode" that if a vein or lode is longer than 1500 feet, a mining claimant would be prohibited from locating an additional lode claim (or claims) to cover the entire strike of the vein or lode. Nonetheless, the

Solicitor's Opinion chooses to ascribe such a limitation to that portion of the statute pertaining to the patenting of millsites.

C. Legislative History.

It is of interest that the Solicitor's Opinion, when reviewing legislative history, deals only with the legislative history of a 1960 amendment to the 1872 Mining Law, rather than the legislative history of the 1872 Mining Law itself. In a footnote, the Solicitor's Opinion indicates that "a review of the legislative history of the 1872 Mining Law reveals no discussion of the acreage limitation in the millsite provision."(10) It is instructive, however, to note that the Solicitor's Opinion does not address the universally-recognized intention of Congress in enacting the Mining Law of 1872, which was to encourage mining on federal lands, "to promote the development of the mining resources of the United States."(11) The effectiveness of a statute designed to promote mineral development is severely inhibited if that same statute limits the right to the use of surface acreage to process the material which has been mined. As discussed above, in light of the avowed intention of Congress in enacting the 1872 Mining Law, an arbitrary limit on the number of millsites per associated lode or placer claim makes no more sense than an arbitrary limit on the number of lode and placer claims that a mining claimant might be able to locate under that law. To the extent that Congressional intent from 1872 can be determined, it is clear the intention was to promote mining, not to make it more difficult.(12)

As to the legislative history behind the 1960 amendment to the Mining Law, which is cited in the Solicitor's Opinion, Solicitor Leshy argues that the legislative history of that amendment makes it clear that Congress in 1960 understood that the 1872 Mining Law permitted only one five-acre millsite in connection with each mining claim.(13) To begin with, as has been widely recognized by the courts, legislative history from a current Congress (for example, in

1960) does not carry much weight in terms of determining Congress' intent in the past (for example, in 1872).(14)

In addition, the purpose of the 1960 amendment to the 1872 Mining Law was to add a provision to the law that gave placer mining claimants the ability to patent millsites. Once that statute was enacted, placer mining

claimants had a right to patent millsites equal to that of lode mining claimants. The legislative history discussed in the Solicitor's Opinion addressed proposed statutory language which would have made the law on patenting millsites, as it applied to placer claimants, different than existing law as it applied to lode claimants. One concern about that proposal, which never got out of committee, was that it would have allowed for each millsite claim to be 10 acres rather than five acres. The committee was also concerned that because proposed language allowed for 10 acres of non-mineral surface per claimant, rather than per millsite claim, the unintended result could be individual millsite claims much larger than five or even 10 acres (due to the fact that a single association placer claim could have as many as eight locators). The Senate Interior Committee report quoted on page 8 of the Solicitor's Opinion simply explains that the bill, as reported, resolved those issues and made the placer law conform to the lode law. In no way did that report, or the 1960 amendment, relate to the Mining Claim/Millsite Ratio.

D. Decisions of the Department of the Interior. Although the Solicitor's Opinion indicates that allowing for multiple millsites is at variance with the statutory text of the 1872 Mining Law "and a body of administrative and judicial decisions," there are no such judicial decisions.(15) As a result, the Solicitor's Opinion relies on a number of early decisions of the Department of the Interior for the proposition that only a total of five millsite acres (although perhaps embodied in more than claim) may be patented per mining claim.(16) A closer analysis, however, reveals that most, if not all, of those Interior decisions were based upon determinations that the 1872 Mining Law limits the amount of non-mineral land that may be patented by need, use and occupancy, and did not even address the question of how many millsites (or how much millsite acreage) is allowed for each mining claim.

In Alaska Copper Co., for example, the Department stated that there is no "fixed rule," although "ordinarily one millsite affords abundant facility for the promotion of mining operations upon a single body of lode claims."(17) In that decision, the Department ruled that, because the evidence indicated that only one of the 18 millsites in question was arguably being used for mining purposes, the patent applicant had located the millsites, "not in good faith to secure title to ground actually needed and used for mining and milling purposes," but to secure control of a valuable water front in violation of the statutory mandate.(18) The crux of that decision was that patent applicants are not automatically entitled to one millsite per mining claim, not that they are limited to a single millsite.(19)

Similarly, other decisions cited by the Solicitor did not turn on the Mining Claim/Millsite Ratio. In Mint Lode and Millsite, for example, the Department again invalidated a millsite because it was not being used for mining or milling purposes, not because the claimant had too many millsites or too much millsite acreage.(20) In Yankee Millsite, the Department upheld the validity of a millsite that was part of a patent application involving four lode claims, considering the issues of (i) whether the millsite embraced only non-mineral land and (ii) whether the millsite was invalid simply because it was in contact with a sideline of one of the lode claims.(21) Even in J.B. Haggin, the earliest Departmental decision cited in the Solicitor's Opinion, the issue of "excess" millsite acreage was not pertinent. That decision involved a request by a patent applicant to patent more than one millsite, not more than five acres.(22) The holding in that decision was only that the Mining Law does not contain limitations on the number of millsites that might be included in a patent application.

E. Agency Actions and Regulations. The Solicitor's Opinion states unequivocally that the BLM's regulations limit millsite acreage.(23) The Solicitor's Opinion cites as authority for that proposition regulations issued by the General Land Office in 1872 (but interestingly dropped from those regulations by 1907), which stated

that the law "expressly limits millsite locations . . . to five acres, but whether so much as that can be located depends upon the local customs, rules or regulations."(24) That statement seems absolutely correct: each individual millsite location cannot exceed five acres, and to be entitled to even five acres a mining claimant must show necessity. That regulation, however, did nothing more than limit the size of any single millsite location. Solicitor Leshy then cites current BLM regulations, which provide that "[P]arties holding the possessory right to a vein or lode claim, and to a piece of non-mineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by R.S. 2337 . . . may file in the proper office their application for a patent, which application . . . may include, embrace, and describe . . . such non contiguous millsite."(25) The Solicitor points out that the regulation "speaks of millsites exclusively in the singular," and that "there is no suggestion in the regulation that more than one millsite may be patented in connection with a mining claim."(26) The Solicitor's contention that silence in the regulation as to whether more than one millsite may be patented leads to the conclusion that the regulation would somehow prohibit that practice is questionable. For the Solicitor to draw that conclusion from the quoted regulation, however, is completely at odds with the decision in J.B. Haggin, in which the Department expressly held that precisely the same regulatory language was not intended to limit patent applicants to a single millsite.(27)

The clearest guidance as to the meaning of the applicable regulations can be garnered from the interpretation fixed on those regulations by the agencies charged with their implementation. On the question of the existence of a Mining Claim/Millsite Ratio, the administering agencies are completely in accord; there is no such rule.(28)

The BLM Manual states:

A millsite cannot exceed five acres in size. There is no limit to the number of millsites that can be held by a single claimant.(29)

The BLM Handbook for Mineral Examiners states:

Each millsite is limited to a maximum of five acres in size and must be located on non mineral land. Millsites may be located by legal subdivision or metes and bounds. Any number of millsites may be located, but each must be used in connection with mining or milling operations.(30)

The Forest Service Manual contains similar language.(31) Terry Maley, a mineral examiner with the BLM's Idaho State office agrees. In his treatise, which even Solicitor Leshy admits is consulted for technical direction in BLM offices, Maley states:

There is no specific direction in the federal law or regulations concerning how . . . many mill sites may be located . . . [T]here is no limitation as to the number of millsites which may be located as long as each millsite is properly "used or occupied" for "mining or milling purposes."(32)

In light of the foregoing, it is not surprising that BLM offices in several states reporting having issued patents for multiple millsites.(33) In addition, it is not surprising that there are IBLA decisions and judicial decisions in which mining projects had multiple millsites and the Mining/Millsite Ratio was never raised as an issue.(34) What is surprising is the Solicitor's surprise in discovering how those agencies interpreted the 1872 Mining Law.

F. Treatises and Legal Scholarship.

In the Solicitor's Opinion, Solicitor Leshy states that "there appears to have been little doubt among miners and mining lawyers that the law allowed no more than five acres of millsite area in connection with each mining claim."(35) As support for this statement, the Solicitor's Opinion cites a number of mining law treatises and articles. In a number of cases, the treatises or articles cited do not stand for the proposition advanced. Solicitor Leshy quotes *Lindley on Mines,* for example, for the proposition that a lode claimant may select more than one non-mineral tract if the aggregate does not exceed five acres. The Solicitor's Opinion ignores additional language in that treatise that suggests that a functional analysis will carry the day. Lindley states that:

The department will deal with each case according to its reasonable necessities, only insisting that if more than one millsite is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown.(36)

Solicitor Leshy also cites an article by Gary Greer, which states that there "is a limitation on the number of claims which may be located in connection with a lode claim or claims. The owner of several contiguous lode mining claims is not necessarily entitled to a millsite for each lode claim."(37) Mr. Greer is simply making the same point that was made by Mr. Lindley; the limitation Mr. Greer refers to is the limitation that arises from the concept that the owner of several contiguous lode claims is not necessarily entitled to a millsite for each lode location. Mr. Greer concludes his analysis of Departmental decisions by saying that nothing in the Hard Cash and Other Millsite Claims decision cited in the Solicitor's Opinion "suggests that a proper entry, use and occupancy of acreage in excess of five acres will not be countenanced, at least insofar as the applicant is able to show a reasonable need for all the lands claimed."(38)

Moreover, there are a number of articles written by mining lawyers which clearly indicate that there is no Mining Claim/Millsite Ratio. Among those articles are Moran, "Sales and Exchanges of Public Lands," 15 Rocky Mtn. Min. L. Inst. 25, 34 (1969) ("...neither the law nor the regulations impose a limit upon the number of claims which may be obtained..."); Harris, "The Law of Millsites: History and Application," 9 Nat. Res. Law. 103, 150-151 (1976) ("since the statute does not limit the millsite locator to a single claim, the obvious response to locate several millsites, thereby acquiring enough land for present and future needs . . . The Interior Department commonly allows a claimant to use and patent several millsites when he can show a reasonable need for all of the land so claimed."); Dempsey, Sherman & Neslin, "Obtaining Surface to Non-Mineral Federal Land by Purchase, Exchange, Permit, and Location," 31 Rocky Mtn. Law Inst. 8-1, 8-29 (1985) ("there are no statutory or regulatory restrictions on the number of millsites that may be located for a mining project."); 1 Am. L. of Mining §5.35 (1960) ("In theory, an unlimited number of millsites might be appropriated by a single mining operator and held or patented as long as each independently meets the requirements of the law"); 4 Am. L. of Mining §110.03[4] at n. 58 (2d ed. 1984) (an unlimited amount of land can be located as millsites and more than one millsite claim may apparently be used provided that the amount of land used is not wasteful).

G. The Mining Claim/Millsite Ratio Issue Is Not An Environmental Issue.

Finally, I think it is important to point out to the Subcommittee that the public debate over the Solicitor's Opinion and the Mining Claim/Millsite Ratio has more often than not been characterized as a debate over "environmental" issues. That characterization is flatly wrong, and tends both to mischaracterize and over-

emotionalize the issue. Press coverage of the issue illustrates this problem. For example, a July 16, 1999, article in the Las Vegas Review - Journal indicated that the millsite limitation provision was added to the House Interior Department Appropriations Bill "to counteract an earlier Senate proposal that would have given mining companies unlimited use of public lands to dump waste, some of it toxic, from mining operations."(39)

In that same article, Representative Jay Inslee (D-Wash.) propounded a very unique interpretation of the 1872 Mining Law, saying:

Taxpayers have one, and only one, protection in our mining law, and that is the part that says if you are going to open a mine on public land and pay nothing for it,

you cannot dump your cyanide waste on more than five acres of taxpayer's land.(40)

Representative Inslee did not cite any particular provision of the 1872 Mining Law for that proposition.

On the same day, another article from the July 16, 1999, American Metal Market indicated that the passage of the millsite language in the House Interior Department Appropriations Bill was seen as a victory of environmental interests over Western state mining concerns. Earlier, when the Senate Appropriations Committee approved an Interior Department Appropriations Bill that did not allow for application of the Mining Claim/Millsite Ratio, an article in the Wall Street Journal stated that the Bill would "exempt many western mines from new environmental rules advocated by the Interior Department."(41) It is perhaps unfair to the Department of the Interior to have its position characterized as promoting "new environmental regulations." Similarly, it is not fair to the mining industry to have the Mining Claim/Millsite Ratio characterized as an environmental issue, when in fact it has application to a vast number of different uses of public lands for mining and milling related purposes, some of which have absolutely no environmental impact. More importantly, it is critical to remember that whenever a mine uses millsites for activities ancillary to mining, that mine (and any millsites comprising a portion of the mine) will undergo a comprehensive state and federal environmental review before a plan of operations can be approved. Ultimately, even if the Solicitor's Opinion was never applied to any operation on federal lands, and millsites blanketed the West, that would not affect one iota the continuing applicability of the Clean Water Act, the Clean Air Act, the Endangered Species Act, and other state and federal environmental laws to mining and milling operations, including operations carried out in connection with mining and milling on millsites. The Solicitor's Opinion addresses a mining law issue, not an environmental law issue.

---

1. "The Mining Law of 1872 provides that only one millsite of no more than five acres may be patented in association with each mining claim." Solicitor's Opinion, p. 2. "The plain language of the Mining Law indicates that only one five-acre millsite per mining claim may be patented." Id. at p. 3. "The statute imposes a limitation that only a single five acre millsite may be claimed in connection with each mining claim." Id. at p. 5. "Because the statute does not support issuing patents for millsite claims totaling more than five acres per placer or lode claim, the Department should reject those portions of millsite patent applications that exceed this acreage limitation. In addition, the Bureau should not approve plans of operation which rely on a greater number of millsites than the number of associated claims being developed unless the use of additional lands is obtained through other means." Id. at p. 2.

2. See, Statement of John D. Leshy before the Senate Energy and Natural Resources Committee, Subcommittee on Forests and Public Land Management, June 15, 1999 (the "Leshy Statement"); Statement of Stephen D. Alfers before the Senate Energy and Natural Resources Committee, Subcommittee on Forests and Public Land Management, June 15, 1999 (the "Alfers Statement"); Statement of Patrick G. Garver before the Senate Energy and Natural Resources Committee, Subcommittee on Forests and Public Land Management, June 15, 1999 (the "Garver Statement"); Statement of Roger W. Jeppson before the

Senate Energy and Natural Resources Committee, (fn. 2 cont.)

Committee on Forest and Public Land Management, June 13, 1999 (the "Jeppson Statement"); Statement of R. Timothy McCrum before the House Resources Committee, Subcommittee on Energy and Mineral Resources, August 3, 1999 (the "McCrum Statement"); Statement of Laura E. Skaer before the House Resources Committee, Subcommittee on Energy and Mineral Resources, September 11, 1999 (the "Skaer Statement").

3. Solicitor's Opinion, p. 3.

4. 30 U.S.C. § 42(a) 30 U.S.C. § 42(b) pertains to patent applications for millsites associated with placer claims, and similarly provides that where "nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim . . . No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do no include a vein or lode."

5. Solicitor's Opinion, p. 4.

6. Id., p. 5.

7. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 74 (1898).

8. Solicitor's Opinion, p. 5.

9. See 30 U.S.C. § 23 (limiting the width and length of lode mining claims); and 30 U.S.C. § 35 (limiting placer claims to no more than 20 acres for each individual claimant).

10. Solicitor's Opinion, p. 7, n15.

11. McKinley v. Wheeler, 130 U.S. 630, 633 (1889); see also, U.S. v. Coleman, 390 U.S. 599, 602 (1968); Maher v. U.S., 56 F.3d 1039, 1042 (9th Cir. 1994).

12. The argument is sometimes made that Congress in 1872 created the Mining Claim/Millsite Ratio because at that time, typical mining methods required only 5 acres of nonmineral surface (or significantly less) for support. See, e.g., Solicitor's Opinion, p.14. While at first blush that statement seems logical, history teaches that it is not necessarily true. The Mining Law of 1872 was written by William Stewart, a mining lawyer and Nevada's first U.S. senator, primarily to address the needs of the mining industry at the Comstock Lode in Virginia City, Nevada. Because they often followed extralateral rights that extended well beyond the side lines of a very small number of lode claims (or even one), miners in Virginia City in fact routinely needed and used well more than 5 acres of surface for each lode claim, to support material removed from literally miles of underground workings. Jeppson Statement, p.5.

13. Solicitor's Opinion, p. 7.

14. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980). See also, Amax Land Co. v. Quarterman, 181 F.3d 1356, 1362 (D.C. Circuit 1999).

15. Solicitor's Opinion, p. 1. The Solicitor himself acknowledges this in the Solicitor's Opinion at p. 8, fn. 16.

16. Solicitor's Opinion, p. 8.

17. Alaska Copper Co., 32 L.D. 128, 130 (emphasis added).

18. Ibid. See also, Hard Cash and Other Millsite Claims, 34 L.D. 325, 326 (1905), which reached a similar conclusion that a mining claimant would have to show a "sufficient and satisfactory" reason to obtain a patent for more than even one millsite applied for with a group of lode claims, the determining principle again being need rather than any Mining Claim/Millsite Ratio.

19. Solicitor's Opinion, p. 12; McCrum Statement, p. 9.

20. Mint Lode and Mill Site, 12 L.D. 624, 625 (1891). Note that in that decision the Department did express a strict view, since rejected, that even a single millsite could not be used with more than one lode claim.

21. Yankee Millsite, 37 L.D. 674, 677 (1909). Again, the number of millsites or extent of millsite acreage were not germane to this decision.

22. J.B. Haggin, 2 L.D. 755, 756 (1884).

23. Solicitor's Opinion, p. 5.

24. Ibid.

25. Solicitor's Opinion, p. 6, citing 43 C.F.R. § 38641.1(b) (emphasis added in Solicitor's Opinion).

26. Solicitor's Opinion, p. 6.

27. J.B. Haggin, 2 L.D. 755, 756 (1884).

28. See, e.g., Nat'l Federal of Federal Employees, Local 1309 v. Department of Interior, 119 S.Ct. 1003 (1999); EPA v. Nat'l Crushed Stone Association, 449 U.S. 64 (1980).

29. BLM Manual § 3864.1.B (1991).

30. BLM Handbook for Mineral Examiners, H. 3890-1, p. III-8 (1989).

31. Forest Service Manual, § 2811.33 (1990) ("The number of millsites that may legally be located is based specifically on the need for mining or milling purposes, irrespective of the types or number of mining claims involved.").

32. Maley, *Handbook of Mineral Law,* at 191 (5th ed. 1993) .

33. Solicitor's Opinion, pp. 1-2.

34. See, e.g., Utah International, Inc., 36 IBLA 219 (1978); Utah International, Inc., 43 IBLA 73 (1980); Barrick Goldstrike Mines, Inc. v. Babbitt, 1995 WL 408667 (D. Nev. March 21, 1994); Independence Mining Co., Inc. v. Babbitt, 105 F.3d 502 (9th Cir. 1997).

35. Solicitor's Opinion, p. 12.

36. 2 *Lindley on Mines* §520 at 1173-74 (3rd ed. 1914)

37. Greer, "Millsites: Nonmineral Mining Claims," 13 Rocky Mt. Min. L. Inst. 143, 169 (1967).

38. Id. at 172.

39. Las Vegas Review - Journal, July 16, 1999, page 1D.

40. Ibid.

41. The Wall Street Journal, June 23, 1999, page A6.

# # #